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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

WELENKEN HIMMELFARB & CO. PETITIONERS
WHAYNE HOUGLAND

v.

JULIA V. SPARROW HOLT (ATCHISON)
ON BEHALF OF HERSELF AND ALL
OTHERS SIMILARLY SITUATED RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

JOHN R BURNS, III
Shoaff, Parker & Keegan
2400 Fort Wayne National
Bank Building
Post Office Box 12709
Fort Wayne, Indiana 46864
Telephone: 219/424-8000
Counsel for Respondents,
Philip G. Hershberger,
Mark Development Company,
Barney A. Tucker, and
Thomas Smith Borders

June 5, 1985

21pp

QUESTIONS PRESENTED

1. Whether the Sixth Circuit may substitute its judgment for that of the District Court in considering the propriety of a Rule 41(b) dismissal?

2. In view of the congested dockets of the federal courts in general, and the conflict that now exists among the circuits with respect to utilizing dismissal as a sanction, should this Court establish guidelines for the dismissal of actions under Rule 41(b) for failure to prosecute actions diligently?

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FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure Rule 41(b):

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

TABLE OF CASES AND AUTHORITIES

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Federal Rules of Civil Procedure:

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Rule 41 2, 3, 7, 8, 10, 11, 12, 13

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Respondents, PHILIP G. HERSHBERGER, MARK DEVELOPMENT COMPANY, BARNEY A. TUCKER, and THOMAS SMITH BORDERS, respectfully submit the following Brief in Response and in Support of the Petition

for Certiorari filed by Petitioners, WELENKEN HIMMELFARB & CO. and WHAYNE HOUGLAND.

STATEMENT OF THE CASE

Respondents, PHILIP G. HERSHBERGER, MARK DEVELOPMENT COMPANY, BARNEY A. TUCKER, and THOMAS SMITH BORDERS, adopt in whole the Statement of the Case presented in the Petition for Certiorari on Pages 1 through 14 and incorporate the same by reference as if fully set out herein.

REASONS FOR GRANTING THE WRIT

The sanction of dismissal for failure to prosecute under Rule 41(b) is no longer available to the District Courts of the Sixth Circuit as a result of the decision below.

Respondents submit that this fact provides the most compelling reason for granting the Petition for Writ of Certiorari filed by Petitioners, WELENKEN HIMMELFARB & CO. and WHAYNE HOUGLAND.

This statement regarding the state of law of the Sixth Circuit subsequent to this decision is not an exaggeration. If a District Court is not entitled to dismiss an action pending for eleven years as a result of four years and ten months of unreasonable delays, attributable solely to the Plaintiff, Petition, Appendix B, p. 10, then no action may properly be dismissed under Rule 41(b) in the Sixth Circuit.

This Court should seize the opportunity to clarify the District Court's discretionary authority to dismiss an action for failure to prosecute, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Both the propriety of, and standards for, dismissal are currently in disarray. By granting the Writ, this Court can resolve this conflict and confusion within the Federal judiciary. Additionally, it can also clarify the

standard of review by which such dismissals are judged.

A definitive ruling from this Court will once again allow the District Court to confidently wield the sword of dismissal as a sanction against dilatory conduct. Dismissal can again become an effective deterrent to parties and their counsel who would allow their cases to languish on an already overloaded Federal docket.

As this Court has already recognized, it is well within the discretion of a Trial Court to dismiss an action, sua sponte, for failure to prosecute. Link v. Wabash R.R. Co., 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962). It is axiomatic that such a discretionary act can only be overturned for abuse.

In the present case, the Sixth Circuit ignored this fundamental principle and instead superimposed its own hind-

sight-enhanced judgment upon that of the District Court. Rather than considering whether discretion was abused, the Sixth Circuit uttered a litany of platitudes which send a clear message to the District Courts commanding them to avoid dismissal as a sanction. To the Sixth Circuit dismissal is a sanction which "should be invoked only rarely". Petition, Appendix A, p. 3. It should only be used when no less powerful or ultimate sanction is available. The Sixth Circuit considers the sanction a last resort which obligates it "to scrutinize dismissals with the utmost care". Petition, Appendix A, p. 4. Nowhere in the opinion is there any recognition of the proper standard of review.

This improper review dramatically conflicts with this Court's mandate regarding similar dismissal, pursuant to Rule 37, announced in National Hockey

League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 49 L.Ed.2d 747, 96 S.Ct. 2778 (1976) and reaffirmed in Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxite De Guinea, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099 (1982). Simply put, the question is not whether the reviewing Court would, as an original matter, have applied the sanction but, instead, whether the District Court abused its discretion in doing so.

Even a facial review of the Sixth Circuit's opinion demonstrates that it failed to make this most basic inquiry. Instead of asking whether the District Court abused its discretion in ordering dismissal, the Sixth Circuit asks whether it would have, as an original matter, ordered the dismissal. The Court's opinion conducts a superficial review of the record and then supplants its own judgment for that of the District Court,

vitiating the District Court's discretion.

No rational basis exists for any variance between the standard of review for a dismissal pursuant to Rule 37 and a dismissal pursuant to Rule 41. Thus, the Sixth Circuit's failure to apply the proper standard of review creates a repugnant discrepancy between dismissals ordered pursuant to Rule 37 and Rule 41, which must be corrected.

This Court should also grant the Petition for Writ of Certiorari due to the current conflict between the circuits concerning dismissals pursuant to Rule 41(b). In addition to the inter-circuit conflicts listed in the Petition for Writ of Certiorari, on pages 30 through 34, the Sixth Circuit's reversal of the District Court's dismissal conflicts with decisions of other circuits, which clearly recognize that dismissals may only be reversed for an abuse of discretion.

The scope of review utilized by the Sixth Circuit is in direct conflict with the following decisions by other circuit courts, which plainly hold that a dismissal pursuant to Rule 41(b) is a matter committed to the sound discretion of the District Court. As such, its decision should be upheld unless that discretion has been abused. Damiani v. Rhode Island Hospital, 704 F.2d 12 (1st Cir., 1983); Harding v. Federal Reserve Bank of New York, 707 F.2d 46 (2nd Cir., 1983); Dyotherm Corp. v. Turbo Machine Corp., 392 F.2d 146 (3rd Cir., 1968); Hepperle v. Johnston, 590 F.2d 609 (5th Cir., 1979); Tinkoff v. Jarecki, 208 F.2d 861 (7th Cir., 1953); Fendler v. Westgate-California Corporation, 527 F.2d 1168 (9th Cir., 1975).

The most glaring conflict exists between the First Circuit and the Sixth Circuit. In Damiani v. Rhode Island

Hospital, supra, the First Circuit upheld the dismissal pursuant to Rule 37(b)(2). In so doing, that Court stated:

> "This circuit has long recognized that dismissal either for failure to comply with discovery orders or lack of prosecution is a matter within the discretion of the district court and the claim of abusive discretion has not received a sympathetic ear from us. In fact, since 1967 we have upheld dismissals in all cases but one." (Citations omitted.) 704 F.2d at 17. (Emphasis supplied.)

Unlike the Sixth Circuit, the First Circuit also rejects the argument that the client should not be responsible for the dilatory tactics of his lawyers relying upon guidance from this Court's decisions in Smith v. Ayer, 101 U.S. 320, 25 L.Ed 955 (1880) and Link v. Wabash R.R. Co., supra.

The disparate treatment received by a dismissal, on appeal, in the First Circuit and in the Sixth Circuit is the difference between night and day. This lack of uniformity in appellate review "is a hydra

in government, from which nothing but contradiction and confusion can proceed."[1] Such disparity requires this Court's intervention to define the role of the District Court and to clarify the standard of review of the Appellate Court with regard to Rule 41(b) dismissals. The case before this Court, presents a unique opportunity for the Court to intervene and resolve the conflict.

The District Courts are currently faced with the prejudicial effect of dilatory practices, delayed justice, and the consequential loss of respect for the Federal judiciary. Rule 41(b) was designed in recognition of the inherent power of a Court to levy sanctions in response to abusive litigation practices. Roadway Express, Inc. v. Piper, 447 U.S.

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[1] A. Hamilton, The Federalist, No. 80, reprinted in Schaefer Reducing Circuit Conflicts, 69 A.B.A.J. 453, April, 1983, p. 454.

752, 65 L.Ed.2d 488, 100 S.Ct. 2455 (1980); Link v. Wabash R.R. Co., supra. However, where the District Court does not have clear guidelines and if its decision is subject to de novo review, its inherent power, as well as its power pursuant to Rule 41(b), becomes an illusion.

The District Courts need a deterrent to counsel who would harbor dilatory motives or create delay by lack of diligence.[2] From 1960 to 1983, the number of civil filings in the United States District Courts increased by a staggering 300

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[2]Chief Justice Burger, in discussing the new sanctions available under the 1983 amendments to the Federal Rules of Civil Procedure has stated:

> Yes, these sanctions serve a useful purpose if they are used with care. They are one way to remind some members of the profession that as officers of the court they have an obligation to the public and to the courts as well as to their clients.

Q & A with the Chief Justice, A.B.A.J., January, 1985, p. 91, 94.

Per Cent.[3] With this remarkable increase in federal litigation, unprosecuted actions languishing on the district court docket only clog the judicial mechanisms, resulting in undue delays to the majority of counsel who diligently prosecute actions entrusted to their care.

In the Sixth Circuit, the real judicial decision-making, pursuant to Rule 41(b), is conducted by the Appellate Court. Unless the District Courts can be assured that their findings will be respected and that their discretion will be accorded proper deference, they will have no power to dismiss or manage their own dockets. This Court can give this assurance and power by granting the Writ.

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[3] In 1960, approximately 60,000 cases were filed compared with 240,000 in 1983. Stewart, Supreme Court Report, A.B.A.J., February, 1985, p. 110.

CONCLUSION

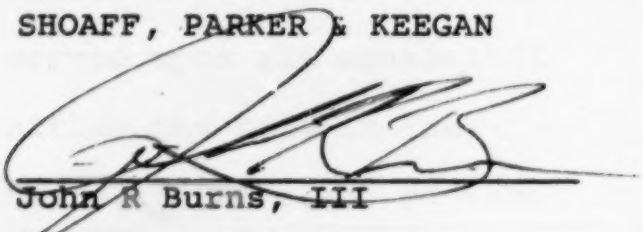
The overburdened Federal judiciary needs to have an effective weapon to combat dilatory litigation practices. Trial Rule 41(b) was designed to be that weapon. The usefulness of Rule 41(b) is emasculated when the Sixth Circuit substitutes its judgment of the District Court that was in the best position to judge the sincerity and deportment of both counsel and parties litgant.

This emasculation exacerbates current conflict within the circuits. The action taken by the Sixth Circuit demonstrates the need to clarify both the Trial Court's ability to dismiss an action for failure to prosecute and the proper standard of review for such a sanction. For the

reasons discussed above, this Court should grant the Writ of Certiorari requested by Petitioners.

Respectfully submitted,

SHOAFF, PARKER & KEEGAN



John R Burns, III

Attorneys for Respondents, Philip G. Hershberger, Mark Development Company, Barney A. Tucker, and Thomas Smith Borders
2400 Fort Wayne National Bank Bldg.
Post Office Box 12709
Fort Wayne, Indiana 46864
Telephone: 219/424-8000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief in Response to Petition for Writ of Certiorari has been served upon all counsel of record by depositing the same in the United States Mails, first class postage prepaid, addressed to said counsel at their last-known address, this 5th day of June, 1985.

SHOAFF, PARKER & KEEGAN

By _____
John R Burns, III